STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY WILLIAMS and BRUCE WENDEL, Plaintiffs-Appellants, v V. R. THOMAS CONSTRUCTION COMPANY, Defendant-Appellant.	UNPUBLISHED March 2, 2006 No. 263309 Oakland Circuit Court LC No. 2003-054316-CZ

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order dismissing their claims for personal injury and property damage pursuant to MCR 2.116(C)(7) (claim barred by the statute of limitations), and dismissing their breach of contract claim pursuant to MCR 2.116(C)(8) (failure to state a claim). We reverse the dismissal of plaintiff Bruce Wendel's breach of contract claim and remand for further proceedings on that claim, but affirm in all other respects.

Defendant is a roofing company that contracted with the Oakland Livingston Human Services Agency (OLHSA) to provide roofing services for indigent homeowners through the agency's "Project Warmth" program. In late 1999, plaintiff Anthony Williams applied to OLHSA for assistance in replacing the roof on a home owned by plaintiff Wendel. Although Williams was living in the home with Wendel at the time, he held no legal ownership or property interest in the home. Williams falsely represented on the application form that he was the homeowner and sole occupant of the home. OLHSA contracted with defendant to replace the roof, and defendant completed the work in January 2000.

Almost immediately plaintiffs began complaining to OLHSA and the local building inspector that defendant's work, which was ultimately replaced, was substandard and defective. In November 2003, plaintiffs filed this action for negligence, breach of contract, intentional infliction of emotional distress, and "conduct of trade." Plaintiffs alleged that defendant failed to properly repair the roof, which caused toxic black mold to grow inside the home, which in turn led to various sinus and upper respiratory illnesses. Defendant filed two motions for summary disposition. In its first motion, defendant argued that plaintiffs' personal injury claims were barred by the statute of limitations, and that plaintiff Williams' breach of contract claim should be dismissed because he was neither a party to defendant's contract with OLHSA nor a third-party beneficiary of that contract. In its second motion, defendant alleged that there was no genuine issue of material fact with respect to the causation element of plaintiffs' claims.

The trial court determined that plaintiffs' claims for personal injury and property damage were governed by a three-year limitations period, MCL 600.5805(10), but were subject to a "discovery rule" which, according to the court, "tolls the Statute of Limitations for 6 months after the date that Plaintiffs knew or should have known of the possible cause of action." The court found that plaintiffs' claims were untimely under either rule, explaining that "[p]laintiffs filed the instant lawsuit . . . more than 3 years and 6 months after the claims accrued or were discovered." The court also dismissed plaintiffs' breach of contract claim on the ground "that Plaintiffs have failed to state a claim of third party beneficiary." Accordingly, the trial court granted defendant summary disposition under MCR 2.116(C)(7) and (8).

I

Plaintiffs first argue that the trial court erred in determining that their claims for personal injury and property damage were barred by the statute of limitations. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681; 599 NW2d 546 (1999). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. *Id*. at 681. When reviewing a motion under this subrule, the court should consider all documentary evidence submitted by the parties, and construe all undisputed allegations in favor of the plaintiff to determine whether the claim is time-barred. *Id*. at 681-682.

Plaintiffs' claims for personal injury and property damage are governed by the three-year period of limitations prescribed in MCL 600.5805(10). The period of limitations runs from the time a claim accrues. MCL 600.5827. A claim accrues "at the time the wrong upon which the claim is based was done regardless of when damage results." *Id*. In this case, defendant initially completed its roofing work in January 2000. Plaintiffs did not commence this action until more than three years later in November 2003.

Our Supreme Court has recognized that a discovery rule may be applied in some cases to avoid unjust results that could occur when a reasonable and diligent plaintiff cannot bring the claim within the applicable limitations period either because of the latent nature of the injury or the inability of the plaintiff to learn of or identify the causal connection between the injury and the defendant's breach of duty. *Moll v Abbott Laboratories*, 444 Mich 1, 15-16; 506 NW2d 816 (1993); see also *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 301; 701 NW2d 756 (2005). Where the discovery rule is found to be appropriate, the plaintiff's claim accrues when the plaintiff discovers, or, through the exercise of reasonable diligence should discover, the injury and the causal connection between the injury and the defendant's breach of duty. *Id*. at 301-302.

Here, plaintiffs were clearly aware of the defects in defendant's roofing work on or before October 23, 2000, which is the date James Broginski, OLHSA's roofing inspector, acknowledged Williams' concerns about defendant's work. Accordingly, to the extent that plaintiffs' complaint seeks damages for injury to their property, the statute of limitations expired on or before October 23, 2003, three weeks before this action was filed.

However, plaintiffs' complaint also seeks damages for personal injury resulting from the mold growth. Plaintiffs asserted below that defendant's defective roofing work caused the

growth of toxic mold, but that they did not discover until October 15, 2001, the date mold samples were collected from plaintiffs' home, that the mold growth was causally related to their illnesses. Although defendant asserts that plaintiffs knew that its work was defective shortly after the work was completed, defendant has not identified any evidence showing that plaintiffs knew or should have known about the causal connection between the mold and plaintiffs' illnesses before October 15, 2001.

The trial court relied on October 15, 2001, as the date that plaintiffs discovered the causal connection between the mold growth and their illnesses, but then stated that "[t]he discovery rule tolls the Statute of Limitations for 6 months after the date that Plaintiffs knew or should have known of the possible cause of action." The basis for the trial court's reference to a six-month tolling period is not clear.[1] If the discovery rule applies, the three-year limitations period did not begin to run until plaintiffs learned, or with reasonable diligence should have learned, that their illnesses were caused by the mold growth that resulted from defendant's allegedly defective work.

But the discovery rule is not applicable to all claims. The discovery rule is generally applied where there is some verifiable basis for the plaintiff's inability to bring the claim within the statutory period. *Nelson v Ho*, 222 Mich App 74, 86; 564 NW2d 482 (1997). Here, plaintiffs do not explain why they were unable to recognize a possible connection between the mold in the house and their upper respiratory illnesses. They have not demonstrated a verifiable basis for their inability to bring their claim within the three-year period. In *Lemmerman v Fealk*, 449 Mich 56, 66-67; 534 NW2d 695 (1995), our Supreme Court summarized the situations in which application of the discovery rule has been deemed necessary to avoid unjust results:

> We have found such situations present, e.g., where there has been a negligence action brought against a hospital and its agent before statutory characterization of such negligence as medical malpractice, . . . in pharmaceutical products liability actions, . . . and in asbestos-related products liability actions . . . . In each of those cases, we have weighed the benefit of application of the discovery rule to the plaintiff against the harm this exception would visit on the defendant and the important policies underpinning the applicable statute of limitations. Balancing is facilitated where there is objective evidence of injury and causal connection guarding against the danger of stale claims and a verifiable basis for the plaintiffs' inability to bring their claims within the statutorily proscribed limitation period. [Citations omitted.]

In *Lemmerman*, *supra* at 67-68, the Court, referring to its decision in *Larson v Johns-Manville Sales Corp*, 427 Mich 301; 399 NW2d 1 (1986), stated that the discovery rule is appropriately applied to asbestos cases "because the latent nature of asbestos injuries made it difficult for plaintiffs to diligently pursue their claims, while the longer period in which defendants were vulnerable to suit did not make it appreciably more difficult for them to defend."

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[1] Although MCL 600.5838(2) and MCL 5838a(2) both refer to six-month discovery periods, those statutes apply to actions involving claims for malpractice and are not applicable here.

Here, plaintiffs have not demonstrated that their injuries were latent in nature, nor do they specify when they first experienced symptoms. Additionally, extension of the limitations period will hamper defendant's ability to defend the action. Because of the delay, it will be more difficult for defendant to correlate plaintiffs' illnesses with the growth of the mold, and it will also be more difficult to determine whether other factors may have contributed to the mold growth or plaintiffs' illnesses. We therefore conclude that this case does not present a situation where the discovery rule should be applied.

In sum, it is not apparent that this is an appropriate case for application of the discovery rule, and plaintiffs themselves make no effort to justify application of the discovery rule to the circumstances of this case. However, although the trial court erred in its reliance on a six-month discovery rule, this Court will not reverse a trial court's order if it reached the right result for the wrong reason. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001). Because plaintiffs' claims for personal injury and property damage were not filed within three years after defendant completed its roofing work, and because plaintiffs have failed to demonstrate that this is an appropriate case for application of the discovery rule, we affirm the trial court's dismissal of these claims based on the statute of limitations.

II

The trial court dismissed plaintiffs' breach of contract claim under MCR 2.116(C)(8), stating that plaintiffs "failed to state a claim of third party beneficiary." We disagree.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). A reviewing court must accept all well-pleaded factual allegations as true and construe them in a light most favorable to the non-moving party. *Id*. The motion may be granted only where the claim alleged is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id*.

To plead a breach of contract claim as a third-party beneficiary, a plaintiff must allege: (1) that a valid contract existed; (2) that a contractual term was violated by the defendant; (3) that the plaintiff was a third-party beneficiary of the contract; and (4) that the defendant's nonperformance resulted in damage to the plaintiff. 2 Callaghan's Michigan Pleading & Practice, § 22:35, pp 112-113. Plaintiffs alleged that defendant "entered into a binding written agreement to perform services, and supply materials," and that defendant "breached the contract by rendering performance that failed to conform to the contractual requirements." Plaintiffs also alleged that they were "intended third-party beneficiaries pursuant to a contract with the Oakland Livingston Human Services Agency for remedial services to be performed on the Plaintiffs' residence by the Defendant," and that they were "entitled to full performance as intended third-party beneficiaries." Plaintiffs alleged generally that they "sustained injuries and damages as a result of the Defendants' [sic] omissions/commissions," including medical problems and property damage.

In *Iron Co v Sundberg, Carolson & Assoc, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997), this Court stated:

> Under Michigan's rule of general fact-based pleading, see MCR 2.111(B)(1), the only facts and circumstances that must be pleaded "with particularity" are claims

> of "fraud or mistake." MCR 2.112(B)(1). In other situations, MCR 2.111(B)(1) provides that the allegations in a complaint must state "the facts, without repetition, on which the pleader relies," and "the specific allegations necessary reasonably to inform the adverse party" of the pleader's claims. See *Dacon v Transue*, 441 Mich 315, 330; 490 NW2d 369 (1992). A complaint is sufficient under MCR 2.111(B)(1) as long as it "contain[s] allegations that are specific enough reasonably to inform the defendant of the nature of the claim against which he must defend."

Plaintiffs' allegations were sufficient to plead a claim for breach of contract as third-party beneficiaries. Plaintiffs alleged that they were intended third-party beneficiaries of defendant's contract with OLHSA, and that defendant breached that contract by performing substandard work. Although plaintiffs did not explicitly state that defendant's breach caused their illnesses and property damage, their general allegations of injury were sufficiently specific to reasonably inform defendant of this claim. Because plaintiffs' complaint adequately stated a third-party beneficiary claim, the trial court erred in granting summary disposition under MCR 2.116(C)(8).

Defendant argues, however, that "the facts established in discovery make it clear that both [plaintiffs] were no more than incidental beneficiaries of the Thomas-OLHSA contract and therefore could not have sued Thomas under the statute." In substance, defendant argues that summary disposition should have been granted under MCR 2.116(C)(10) (no genuine issue of material fact). Although the trial court did not grant summary disposition under this subrule, an order granting summary disposition under the wrong rule may be reviewed under the correct subrule. *Stoudemire v Stoudemire*, 248 Mich App 325, 332 n 2; 639 NW2d 274 (2001).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id*. at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Id*. at 540; see also MCR 2.116(C)(10) and (G)(4).

Defendant argues that plaintiffs cannot be third-party beneficiaries of its contract with OLHSA because plaintiff Williams did not own the house and plaintiff Wendel did not apply for OHLSA's assistance. MCL 600.1405 provides, in pertinent part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.
>
> (2)(a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which

> the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.
>
> (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.

An objective standard is used to determine whether a plaintiff is a third-party beneficiary of a contract. *Krass v Tri-County Security, Inc*, 233 Mich App 661, 665-666; 593 NW2d 578 (1999). The contract itself reveals the parties' intentions. *Id*. at 666.

In *Koenig v South Haven*, 460 Mich 667; 597 NW2d 99 (1999), our Supreme Court explained that § 1405 allows the contracting parties to designate a class of persons as the intended beneficiaries of a contract, and that unnamed and unascertained persons qualify as third-party beneficiaries if they belong to that class. The Court stated:

> Simply stated, section 1405 does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation "directly" to or for the person. This language indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract. Subsection 1405(2)(b)'s recognition that a contract may create a class of third-party beneficiaries that includes a person not yet in being or ascertainable precludes an overly restrictive construction of subsection 1405(1). That is, it precludes a construction that would require precision that is impossible in some circumstances, such as would be the case if there were a requirement in all cases that a third-party beneficiary be referenced by proper name in the contract. [*Id*. at 676-677.]

The Court explained that a third-party beneficiary may be one of a class of persons, if the class is sufficiently described or designated. *Id*. at 680. The Court also explained that "only *intended* third-party beneficiaries, not *incidental* beneficiaries, may enforce a contract under § 1405." *Id*.

An examination of the contract between defendant and OLHSA reveals that its obvious purpose is to benefit homeowners who could not afford weatherproofing services. It is also apparent from the contract that defendant understood that it was performing work for the direct benefit of the homeowner, even if it did not know the owner's identity. Defendant's contract with OLHSA required it to "complete roofing on assigned homes during the term of this Contract," and stated that "[f]ailure to complete the assigned homes shall result in unsatisfactory performance under this Contract." The contract obligated OLHSA to inspect each home after the work was completed, and required defendant to provide both "the client and OLHSA" with a written guarantee. These provisions express OLHSA's intent to retain defendant's services in order to benefit the client, i.e., the homeowner. The contract further states that "[n]o work shall begin until the Agency issues a written Job Order to the Contractor." The "Proceed to Work

Order" in this case listed defendant as the contractor and plaintiff Williams as the client. This document also indicates that the project was funded by a low-income home energy assistance program and the Oakland County Community Development Block Grant. Because the contract clearly indicates that OLHSA was paying defendant to perform work on the homes of OLHSA's clients, and obligated defendant to guarantee its work for the benefit of the clients, we conclude that homeowners receiving OLHSA's assistance constitute a clearly designated class of persons intended as beneficiaries of the contract between defendant and OLHSA. Although plaintiff Wendel, the homeowner, is not identified as an owner in the contract or job order, he clearly is a member of this designated class. Therefore, plaintiff Wendel qualifies as an unascertained third-party beneficiary under § 1405(2)(b).

Defendant's reliance on *Koenig*, *supra*, to argue that plaintiff Wendel is only an incidental beneficiary, is misplaced. In *Koenig*, the plaintiffs' decedent was swept off a pier on a windy day. *Id*. at 670. The defendant city and the Army Corps of Engineers were parties to a contract that required the defendant to deny the public access to the pier during periods of inclement weather. *Id*. at 670-671. The plaintiffs argued that the decedent was a third-party beneficiary of that contract, and that they were entitled to sue for breach under § 1405. *Id*. at 672. The Supreme Court held that the contract "only references the public generally and includes no provision by which [the defendant] undertook to do anything directly for a *designated* class of persons that included [the decedent]." *Id*. at 682-683. The Court concluded that "the public" was "too broad a term to constitute a class that a contracting party could undertake *directly* to benefit under subsection 1405(1)." *Id*. at 683. This case is distinguishable, because here OLHSA did not contract with defendant to perform services for the general public, but for OLHSA's clients, i.e., individual homeowners who qualified for assistance.

This case is more analogous to *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1; 535 NW2d 215 (1995). In *Hammack*, the defendant was a social services agency that contracted with the state to operate a semi-independent living facility for developmentally disabled individuals. *Id*. at 3. The plaintiff's decedent suffered a seizure and drowned while bathing unsupervised. *Id*. This Court held that the decedent was a third-party beneficiary of the contract because the defendant promised to provide appropriate services for the facility's residents. *Id*. at 7. Here, defendant's relationship to OLHSA and the recipients of its services is similar to the living facility's relationship to the state and the beneficiaries of the state services. Accordingly, we conclude that the trial court erred in dismissing plaintiff Wendel's breach of contract claim.

We agree, however, that there is no genuine issue of material fact that plaintiff Williams was not an intended beneficiary of the contract between defendant and OLHSA, but is rather only an incidental beneficiary. Williams had no property interest in the house, and he had no familial or legal relationship with Wendel. Thus, he derived benefits from the contract only because Wendel permitted him to live there. Moreover, when Williams filled out the application, he falsely represented that he was the owner and sole occupant of the house. Consequently, defendant could not have known that it was performing work for anyone other than the (actual) owner. We therefore conclude that defendant was entitled to summary disposition with respect to plaintiff Williams's breach of contract claim under MCR 2.116(C)(10).

III

Plaintiffs raise several other issues that require only brief discussion. Although plaintiffs argue that the trial court improperly denied them transcripts at no cost, the trial court's opinion and order indicates that the court decided defendant's motion without oral argument, and plaintiffs fail to specify what transcripts they requested but did not receive. Plaintiffs also complain that their attorney was ineffective and unethical. However, these claims do not challenge any action or decision by the trial court, and this appeal is not the appropriate forum for these complaints. Although the Sixth Amendment affords an indigent criminal defendant the right to the effective assistance of counsel in criminal prosecutions, it has no applicability to civil proceedings. See *United States v $100,375.00 in United States Currency*, 70 F3d 438, 440 (CA 6, 1995), and *Haller v Haller*, 168 Mich App 198, 199-200; 423 NW2d 617 (1988). Plaintiffs also assert that defendant's attorney acted unethically by submitting false affidavits from defendant's president. Plaintiff did not challenge the affidavits in the trial court, however, and plaintiffs have not demonstrated on appeal that the affidavits contain any demonstrably false statements. Accordingly, we find no merit to this issue.

In sum, we reverse the trial court's dismissal of plaintiff Wendel's breach of contract claim, but affirm the dismissal of all claims by plaintiff Williams, and all remaining claims by plaintiff Wendel.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens